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Copy of opinion

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Concord

June 14, 1974

Morris Silver, Chairman
Board of Prison Trustees
New Hampshire State Prison
Concord, New Hampshire 03301

Dear Mr. Silver:

In your letter of May 7, 1974, and in the letter of Trustee Martin L. Gross of May 15, 1974, the Board of Prison Trustees requests the opinion of this office as to "the procedure and authority for selecting a warden" of the New Hampshire State Prison, and "the present law regarding lines of authority, precisely, to whom the warden of the New Hampshire State Prison is initially responsible." Our opinion on these questions is as follows.

For thirty-eight years prior to 1957, the power to appoint the warden of the New Hampshire State Prison was specifically vested in the Prison Board of Trustees in statutory language then contained in RSA 615:3, which provided in pertinent part:

"615:3 Duties and Powers of Board of Control and Trustees; Corrections. . . . The boards of trustees of the state prison and parole, and industrial school and parole, shall each appoint the executive of its department or institution subject to the approval of the governor and council, . . ."

In 1957, this specific provision was repealed without any specific substitute provision for the appointment of the warden. 1957 Laws 164:1. As a result of this legislative action, there are three distinct possibilities as to where the power to appoint a warden may reside. These are the three bodies which have historically possessed this power: the Board of Trustees of the New Hampshire State Prison, the Governor and Council, and the General Court. For the reasons which follow, it is the opinion of this office that the power to appoint the warden remained with and continues to reside in the Board of Trustees of the New Hampshire State Prison.

It could be argued the repeal of the specific appointment power without corresponding substitution created a statutory vacuum thereby vesting the power of appointment in the General Court, pursuant to Part 2, Article 5 of the New Hampshire Constitution, which provides in pertinent part:

"[Art.] 5. [Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations. And further, full power and authority are hereby given and granted to the said general court, . . . to name and settle biennially, or provide by fixed laws for the naming and settling, all civil officers within this state, such officers excepted, the election and appointment of whom are hereafter in this form of government otherwise provided for; . . ."

However, the evidence against this construction includes the total absence of any legislative action or attempt to exercise this power. When the position of warden became vacant in 1972, it was filled by the appointment of Joseph C. Vitek to that position by the Prison Board of Trustees. This action engendered no outcry from legislative leaders, nor were any objections subsequently made to this action. In addition, in the two legislative sessions which have followed this appointment, no remedial action has been taken or even suggested. We, therefore, conclude that the power to appoint the warden was not intended to reside in the General Court and does not so reside at this time.

Similar considerations compel the conclusion that the power to appoint does not reside in the Governor and Council. 1957 Laws 164, which enacted the 1957 amendment to which we have referred, also inserted the word "executive" within that provision of RSA 10:1 which provides that the "ultimate executive authority" over certain institutions, including the Prison, is vested in the Governor and Council. It may therefore be questioned whether this language gives the appointing power to the Governor and Council. We answer no to this question.

The other institutions to which RSA 10:1 applies are headed by executive officers who are appointed by independent boards analogous to the Prison Board of Trustees. These grants of appointing authority to the other boards are done by specific statutes, outside of RSA 10:1. Since the quoted language of RSA 10:1 obviously does

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not give the Governor and Council power to appoint the heads of the other institutions mentioned, it is highly improbable that the Legislature intended that language to give them power to appoint the head of this one institution.

The 1957 legislation which effected this repeal was concerned with the creation of several advisory boards to State institutions. In this context, inclusion of the word "executive" in the phrase "ultimate [executive] authority" evidences an intention to contrast the supervisory authority of the Governor and Council with the advisory character of the boards created by this legislation. In addition to these considerations, the legislative history of this 1957 change is devoid of any evidence of intent on the part of the Legislature to transfer the power to appoint the warden of the New Hampshire State Prison from the Prison Board of Trustees, which transfer would truly have been an extraordinary alteration of the existing appointment system. Further, there was no contemporary reason to effect such a change, as the warden then serving, Parker L. Hancock, had served as warden for a considerable period of time and had not evidenced any intention to leave. In fact, he would continue to serve for another fifteen years. Finally, the actual procedure followed in the sole appointment of a warden since the 1957 revision, that of Joseph C. Vitek in August of 1972, further illustrates the reasoning behind the conclusion that the Governor and Council does not have the power to appoint the warden. Mr. Vitek was appointed by the Prison Board of Trustees, and that appointment was "concurred" in by the Governor and Council at their August 31, 1972 meeting.

Turning now to the power of the Board of Trustees, we have noted above that in 1957 the Legislature repealed RSA 615:3 which was then the latest version of a statute originally enacted as 1919 Laws 14:3, providing that the Trustees of the Prison should choose a warden subject to Governor and Council approval. During all the years this statute was on the books, there had existed another statute defining powers of the Trustees, which remains as part of the law today, RSA 622:5, I:

The trustees, subject to the supervision and direction of the governor and council, shall have power:

I. To appoint all officers and servants necessary for the management of the prison, and to remove them, subject to the regulations of the state personnel commission.

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It would take a long essay to chronicle all the different schemes for governing the Prison which have been enacted since the early nineteenth century. By the time the present trustee arrangement took recognizable form in 1919, the trustees were given power to appoint the warden subject to approval of the Governor and Council. 1919 Laws 14:3. Under the "general supervision and direction of the governor and council," they were given by the same section the management of the Prison affairs. The Public Laws of 1926 codified these changes into substantially the form of RSA 622:5, I. P.L. 400:6, I. Thus, until the change wrought by 1957 Laws 164, the trustees had a power to appoint a warden subject to Governor and Council approval, and at the same time had power subject to the supervision and direction of the Governor and Council to appoint "all officers and servants." Since the Governor and Council had greater power under what became RSA 615:3, that statute was in fact relied upon in appointing the warden, even though the warden might otherwise fall within the meaning of "officer" in which became RSA 622:5, I.

When the present codification of the law, The Revised Statutes Annotated, was enacted in 1955, the scheme of separate statutes relating to warden and "all officers" was carried forward. The power to appoint and remove all officers, however, was amended by making it expressly subject to "the regulations of the state personnel commission." Since the Revision Commission "did not intend to change the meaning of the law" (1 RSA p. lxxvii), it simply required expressly what would otherwise have been the law, that hiring and discharge of classified employees must be done within the constraints of the personnel system. It is reasonable to suppose that no one considered whether "all officers" was broad enough to include reference to the warden, for there was no need to consider that.

There is reason to infer that the Legislature in 1957 assumed that "all officers" was broad enough to include reference to the warden, for the very reasons discussed above: the specific statute previously governing the appointment of a warden, RSA 615:3, was repealed by 1957 Laws 164, and both legislative history and practice since 1957 are absolutely devoid of any suggestion that the 1957 repeal was intended to strip the Trustees of power over appointment of the warden. Since no statute other than RSA 622:5, I, is even arguably capable of empowering the Trustees to make the appointment, the 1957 Legislature must have assumed it was broad enough to do so, and at least since the Vitek appointment in 1972 the Legislature and Governor and Council assumed that the Trustees had in fact acted under that statute.

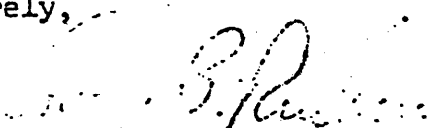
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We, therefore, conclude that the effect of 1957 Laws 164:1 was to leave the Trustees "subject to the supervision and direction of the governor and council" with the power to appoint the warden, as the chief of "all officers and servants necessary for the management of the prison." RSA 622:5, I.

In response to your inquiry concerning "the present law regarding lines of authority and, precisely, to whom the warden of the New Hampshire State Prison is initially responsible," our answer is as follows.

The warden of the New Hampshire State Prison is charged with the superintendence and general management of that institution. RSA 622:2. His duties are enumerated in RSA 622:7. RSA 622:7, III, provides that it is the duty of the warden "to obey and enforce all orders, by-laws and regulations which may be made by the trustees for the management of the prison." There is, thus, a clear statutory mandate for the warden to respond to the directions of the Board of Trustees in his management of the institution. The powers of the Board of Trustees over the Prison are enumerated in RSA 622:5. Among these powers, at RSA 622:5, II, is the power "to define the powers, duties and compensation of such officers." Included in this power is the authority to direct and supervise the warden. This power of the Trustees over the warden is limited by the "supervision and direction of the governor and council" in RSA 622:5. Nowhere either in RSA 622:5 or in RSA 10:1 or in RSA 10:2 are the terms "supervision and direction" defined. It is our opinion that in its creation of the Board of Trustees of the New Hampshire State Prison, the Legislature has set that Board between the warden and the Governor and Council. Therefore, the warden is directly responsible only to the Board of Trustees while the Board of Trustees is under the "supervision and direction of the governor and council."

Sincerely,


Warren B. Rudman
Attorney General